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Supreme Court, U.S.
FILED
OCT 12 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-82

MICHAEL ANTHONY TOMEO,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Tenth Circuit

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PETITIONER'S REPLY TO SUPPLEMENTAL MEMORANDUM

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THE CADILLAC PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1200

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In order to appreciate the extraordinary "Supplemental Memorandum" which the Government has filed at the eleventh hour in this proceeding, it becomes necessary to restore to context the questions presented in the original Petition. Petitioner there suggested that this case presents the question whether evidence of the *receipt* of telephone calls made from another State regarding wagering is sufficient to support a conviction under 18 U.S.C. §1084(a) which makes illegal only "the *transmission*" of such communications.[1] Stated otherwise, Petitioner asked whether,

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[1] Emphasis is added throughout this Brief.

when Congress specified "transmission" in one subsection of a statute and "transmits or receives" in another subsection of that statute, may the subsection which uses the word "transmission" alone be interpreted as if "transmission" were used in conjunction with "receiving".

As reasons for granting the writ, Petitioner pointed out that the decision below recognized and reflected a division among the Circuits as to the correct interpretation of the statutory provision involved: "At present *the Circuits do not agree* on the meaning and scope of Section 1084(a)." (App. p. 3a). When the Seventh Circuit was called upon to interpret this statutory provision it too recognized the conflict: "Although we recognize that *there is language* in at least one case involving the use of the telephone *that points in the other direction*, we believe that the coverage of paragraph (a) of Section 1084 is limited to prohibited transmissions and does not encompass mere reception". *United States v. Stonehouse*, 452 F.2d 455, 456-457 (7th Cir., 1971).

In its Reply Brief, Petitioner pointed out that the Government has sought to plead confession and avoidance: "We *concede that that is a dispute among the circuits* on the reading of the statute * * *." (Memorandum for the United States in Opposition, "Opp.", p. 3.); but the Government then seeks to avoid the consequences of that admission by urging that "the present case does not properly frame the issue for resolution". (*Ibid.*)

To support this contention, the Government argues that the conviction below is sustainable on two separate bases: not only did the Petitioner use a wire communication facility for the transmission of wagering information, but also, the Government now contends, the Petitioner caused

such use. Accordingly, if the conviction cannot be sustained under Section 1084(a) as to the transmission aspect of the charge, the Government asserts that it should be sustained on the theory that the Petitioner caused such use. In support of this argument the Government relied heavily upon the decision of the Second Circuit in *United States v. Kelley*, 395 F.2d 727 (2d Cir., 1968) certiorari denied 393 U.S. 963 (Opp. p. 5).

The *Kelley* case involved an indictment in which the defendant was charged not only with violation of §1084 (a) *but also with a violation of 18 USC §2(b).* And, based upon that explicit charge, the Second Circuit opined that "[a] person may be held responsible as a principal under 18 U.S.C. §2(b) for causing another to do an act which would not have been criminal if directly performed by that other person". Petitioner answered that assertion in its Reply Brief by pointing out that there was no 18 U.S.C. §2 issue in this case, and cited pertinent portions of the trial record to demonstrate that to be so.

And now comes the Government in its "Supplemental Memorandum" and, without a single word concerning the meaning and impact of 18 U.S.C. §2 to cases such as this, attempts to further obfuscate matters by referring to sections of the trial record to indicate that the question of "cause" was in fact argued to the jury. But it should be noted that the word "cause" appears nowhere in 18 U.S.C. §1084(a). The only statute which makes it a crime to *cause* the use of a wire communication facility for transmission of wagering information is 18 U.S.C. §2(b).[2]

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2 "Whoever willfully *causes* an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. §2(b).

However, as may be plainly seen, the indictment in this case charges only violations of 18 U.S.C. §1084(a); it does not even mention 18 U.S.C. §2. (App. p. 7a-8a).[3]

Accordingly, the Government's argument that there is an alternative ground on which the conviction in this case can be based is manifestly incorrect. Indeed, that argument proves far more than the Government intends. It demonstrates that, in addition to the conflict between the Circuits as to the scope and meaning of §1084(a), there is a further conflict in these cases involving the relationship of §1084(a) with §2(b). The Government has thus presuasively presented a further reason why the Petition in this case should be granted: to give this Court an opportunity to clarify definitively this obviously perplexing area of the federal criminal law.

Respectfully submitted,

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[3] Thus, it is no wonder that the Trial Court observed that "the case has been tried on a different basis" and defense counsel concurred "that 18 U.S.C., Section 2, doesn't have anything to do with it". (Tr. 75)